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"AGENCY BY ESTOPPEL": A REPLY.

In a previous article in the COLUMBIA LAW REVIEW¹ I attempted to work out the basis of the liability of the principal for all contracts entered into on his behalf by an agent acting within his "apparent" or ostensible (but beyond his—so-called—real) authority, and reached the conclusion that

"The principal is bound because, according to all sound principles, he has entered into a contract with the third party. . . . The liability in question is a true contractual liability."

In the course of the article I had occasion, naturally, to criticize the attempts of Mr. John S. Ewart and others to explain the liability in question by the law of estoppel instead of contracts. To this criticism Mr. Ewart has replied in his usual brilliant and witty manner.² The Editor of the REVIEW has kindly consented to allow me space in which to say a few words concerning this reply.

As I see it, although my learned brother at first sight seems to make out a strong case, he has in reality left my position entirely untouched. The appearance of strength which his argument possesses is, I venture to think, due to the following procedure: He has first separated from their context certain parts of what I wrote, and has then proceeded to give them a meaning which, thus standing alone, they perhaps are capable of having, but which nevertheless, it will be obvious to the unprejudiced reader who considers them in the light of their context, it was clearly not my intention they should have. This accomplished, he proceeds with a flourish of trumpets to demonstrate that the propositions thus imputed to me, but which I never for a moment dreamed of maintaining, are not to be supported. In what follows I wish, therefore, to restate, and so to bring out more clearly, if possible, my position, and, in doing so, to point out incidentally in just what way Mr. Ewart has misinterpreted me.

¹ 5 COLUMBIA LAW REVIEW, 36.

² 5 COLUMBIA LAW REVIEW, 354.

In my former article I said :

“ It is fundamental in the law of contracts that a person is bound, not by his real, but by his manifested intention, *i. e.*, by his intention as manifested to the other party.”

To this Mr. Ewart replies :

“ Now, according to my library that proposition is not only not a fundamental principle, but it is not a principle of any kind. It is not even a comprehensible assertion.

* * * * *

“ My notion is that it is fairly fundamental in the law of contracts that a man is not bound by intentions of any sort—real or spurious intentions, manifested or concealed intentions, good, bad or indifferent intentions. Frequent visitations at a lady’s house may induce a very proper question as to the nature of the gentleman’s intentions ; but even if he replied (to the lady herself) that he intended some day to marry her, he would not (because of that very clear manifestation of his intention) be liable in breach of promise.”

If the learned reader will refer to my article, I feel sure that he will agree with me that, however capable of misconstruction my language may be when isolated from its context, its meaning is entirely clear when read in connection with what comes before and what comes after ; and, moreover, that that meaning is not that given it by Mr. Ewart. Within the short space of a magazine article, condensation is necessary, and one cannot attempt to write a complete treatise upon the law of contracts. Remembering that I am discussing simply the question, When has a person made an offer which by acceptance will ripen into a contract ? it is clear that the meaning of the passage quoted is simply this : In the law of contracts a man is bound in accordance with the intention which he has manifested to the other party *to enter into a contract with him*, and of course—I supposed I need not discuss that—only after the offer has been accepted by the offeree. In fact, I can hardly persuade myself that my learned brother meant his interpretation to be taken seriously, for he immediately adds :

“ Prof. Cook has been wanting to intervene while this poor sinner has been talking, and now he says, ‘ Be fair, Mr. Ewart, I did not say that a man was bound by his intentions alone ; but that in the law of contracts, and as between real and manifested intentions, the latter were the important ones.’ In reply, I reiterate : (1) Intentions are intentions and nothing

but intentions; (2) a manifested intention is an intention (a real intention) made manifest; (3) in the law of contracts a man is not bound by intentions of any sort, but only by contract."¹

To proposition (3) I heartily subscribe, but I must venture to dissent from the other two. I deny that the phrase "manifested intention" means necessarily, always and everywhere, "a real intention made manifest", admitting that it may and very often does convey that idea. However, it is useless for Mr. Ewart and myself to waste space in a law review in discussing a mere question of English, for that is all the criticism in question comes to. I submit that it is entirely obvious that the phrase as used by me meant an intention which a man led another to believe he had, irrespective of whether he had any such intention or not. Any criticism, therefore, based upon the other interpretation does not touch my proposition upon the legal question, but involves, as I have already said, only a fruitless discussion concerning the proper meaning of the word "manifested." I chose the phrase because it was in use in current discussions of the law of contracts, and, as I thought and still think, conveyed to those familiar with such discussions my exact meaning.

Let me attempt to state my proposition in another form, which I hope will prove to be at least "comprehensible" to my learned brother, even with nothing but his (apparently) very limited library to aid him. Suppose I put it this way: If I appear to another person, such other person being an ordinarily reasonable man, to be offering to enter into a contract with him, and if, moreover, I am legally responsible for that appearance, then I am, so far as the law is concerned, offering to enter into a contract with him, and if he accept—of course within a reasonable time or before a notice of withdrawal is received—I am bound by a contract; and this altogether irrespective of whether I actually intended, as a question of psychology, to make a

¹ May I point out that in using the language I did, I sinned in good company? In "Ewart on Estoppel", page 473, we find the following passage: "A man cannot be bound by the act of another unless he authorizes it." The obvious inference is: If the principal authorized the act of the agent, he is bound by the act, not by the resulting contract. Need more be said?

contract or not. To illustrate what I mean, let us first consider a case already discussed in my previous article, starting with Mr. Ewart's statement and discussion of the same:

"An offer by mail is accepted after a telegram withdrawing the offer has been sent, but before its reception; there was no mental assent; and there is a contract owing to the principle of manifested intention. There is a contract here, no doubt, but intention (manifested or otherwise) has nothing to do with it. Suppose that with the offer goes this P. S. (expressive of the real meaning): 'This offer (without writing of further letters) I keep repeating to you until a reasonable time for its acceptance elapses, or until you receive from me a notification of its withdrawal;' and that prior to either period the offer is accepted. Have the minds not met, even although the offerer may have endeavored meanwhile to withdraw his letter? At the very moment of the offer being made it was accepted."

To begin with, isn't our learned brother getting a little into the realm of fiction when he says that his P. S. is "expressive of the real meaning" of the language in the letter? I should rather have said that the legal effect, not the real meaning of the language, was the same as though he had added the P. S. or had kept repeating the offer until the expiration of the periods mentioned. Now, honestly, Mr. Ewart, as a matter of psychology, have the minds of the parties met? That is, has there been an actual coming together of the two minds in agreement? Was the offer actually, as a matter of psychology, really being made at the moment of acceptance? Surely not, and if you reply, the law does not mean any such thing by this phrase—a meeting of minds—I will heartily agree with you; but it surely does not follow that the law has forsaken fact and taken refuge in the realm of fiction when it thus ignores real intention and deals only with manifested intention. What the law does is simply to say to the offerer: You appeared to the other party to be agreeing with him, and were responsible for that appearance; therefore, so far as the law is concerned, you have agreed with him, and there has been a meeting of your minds. Now, the whole burden of my article is just this: that I appear just as much to be offering to enter into a contract with the third party when my agent acts within his authority, be it "real" or "apparent," as I do in the case just discussed, and I am

equally responsible for that appearance.¹ Let me illustrate by a concrete case of "apparent authority."

I go to J. S., a person who knows nothing about the law—just a plain, ordinary, everyday layman of average intelligence. I say to him: "I am selling off my horses. Go around to my stable and you will find X. there." (X. is not a dealer in horses, and has never represented me before.) "He is authorized to sell you any of the horses, and has full power to fix prices and all conditions of sales." Suppose further I have told X. not to sell a particular bay horse at all, of which limitation, however, J. S. has no knowledge. J. S. goes to X. and asks: "What will you take for the bay horse?" X. replies: "Two hundred dollars." Would it not appear to any ordinarily reasonable man, such as J. S. is, that I through X. was offering him the bay horse for \$200? I venture to think J. S. would be very much surprised to be told by Mr. Ewart that the bay horse had not

¹Another illustration of the principle here contended for is contained in another case discussed in my previous article.

"A, intending to lead B to believe that she is entering into a marriage with him, but with no intention of binding himself, represents to her that C is a clergyman duly authorized by law to perform marriage ceremonies. A and B go through a marriage ceremony before C, B acting in good faith throughout. C in fact is only a layman and without authority in the matter. Is there a valid marriage? In a jurisdiction in which common law marriages are valid, yes. Why? Because A is estopped to deny that C was a clergyman? Not at all; he has manifested his intention to B to take her as his wife; she has manifested her intention to him to take him as her husband, and the marriage is complete. The fact that A did not intend to bind himself is immaterial." Concerning this Mr. Ewart says: "Well, that is our marriage case over again. Let us omit the ceremony (as it seems to be important only as a manifestation of intention) and *substitute a perfectly plain verbal declaration of reciprocal intentions to marry one another*, is there in such a case a contractual marriage? Of course not, for intentions—real, manifested or even mutually manifested—are not a contract. Intentions, here, are of no more importance than elsewhere; and the easy solution of the case is this: If by the *lex loci* marriage is good by mere contract, then the language of the ceremony would almost certainly amount to a contract; if it did not, two train loads of male and female intentions would not help anybody." The italics are mine. Is it not obvious that Mr. Ewart has changed my case? Going through a marriage ceremony is not "a perfectly plain verbal declaration of reciprocal intentions to marry one another" in the future, but a statement by each party of an intention to assume the matrimonial status at the moment. Note also that Mr. Ewart says that the language of the ceremony would almost certainly amount to a contract, but he fails to explain why, and thereby dodges the whole issue. Further comment seems unnecessary.

been offered to him for that sum by me through my agent.¹

I contend that the legal effect of what I have said and done is just this: I appear to an ordinarily reasonable man to be making him an offer to enter into a contract with him, this appearance arising whenever, by words or acts or both together, I say to him that a certain person has authority to make the offer in my behalf, and such person does so; and under such circumstances I am legally responsible for the appearance, and have therefore made an offer. Adopting Mr. Ewart's own method, we may say farther that to the language of the case supposed there is added this P. S., expressive (I should say) of its legal effect: "This statement (that X. is authorized to sell you any of the horses on any terms he fixes) I keep repeating to you until a reasonable time has elapsed, or until you receive from me a notification of withdrawal of the authority." At the very moment, therefore, that X. says to J. S., "You may have the bay horse for \$200," it is as though I were repeating to J. S.: "X. is authorized to offer you the horse on those terms." Is that not a good-enough offer by the principal through his agent?

As I said in my previous article, I think a good bit of the trouble in all these cases lies in a failure to appreciate and keep in mind at all times the distinction between the two relationships which are recognized by our law of agency—the internal and the external, if I may call them such. By this I mean that our law recognizes that, while as between principal and alleged agent the relationship of agency may in a given case not exist, at the same time it may and often does exist as regards third parties. The failure to keep this in mind is doubtless what leads Mr. Ewart to say, with reference to these cases of "apparent" authority:

¹ I am assuming that the learned reader has read my former article, in which, I think, it was shown that in the law of agency I may manifest my intention and so make an offer to contract through another human being, called an agent, and that in such case, though many, if not all, of the terms of the offer are really fixed by the agent, and often are not known to the principal until long after the contract has been made, nevertheless our law says that the principal through the agent made the offer, and so the contract. This is obviously true in the case of the so-called "real" authority, and my contention is simply that the same thing holds good in "apparent" authority.

"In cases of this class, it seems to be clear enough that the principal did not himself make the contract; that he did not authorize any one to make it; and that (sometimes) it was made in absolute violation of his clearly expressed will. It appears to be equally clear that the agent did not make the contract for him; and that he could not; for he had no authority to do so; he may, indeed, have been expressly inhibited from that very act. If, then, we have here 'a true contractual liability,' it is one of such peculiar sort that it is based upon something which the principal did not do; and which no one having his authority did; but upon something which may have been done in actual contravention of his will."

True enough, the principal did not himself, *i. e., in person*, make the contract—he never does in agency—but, I contend, he did, so far as the third party is concerned, authorize the agent to act for him, and so through the agent he (the principal) made the contract. Let us never forget that our law of agency does not say that the agent makes a contract and that by some process of transfer the rights and duties thus created are transferred to the principal; but that, on the other hand, it does regard the contract as made by the principal through the agent, the agent being treated only as a medium of communication. It is the mind of the principal which meets the mind of the third party, just as much where the medium of communication is an agent as where, for example, it is a letter. As I said in my previous article, the phrase "apparent authority" is misleading: so far as the person to whom the authority is represented as existing is concerned, such authority does exist, it is a real authority; the agent is authorized to do what he does. It may be that, as between himself and his principal, he has been guilty of a breach of duty; that does not and cannot affect the fact that the external relationship existed as a fact.

Turning now to the question of whether the two theories lead to the same results, I must confess that here I have had and still have some difficulty in following my learned brother's argument in support of the proposition that they do. He says:

"Prof. Cook presents a problem to the sinners: Take, he says, a purely executory contract made by an agent without sufficient authority, and how are you going to bind the principal by your doctrines? Estoppel requires that the estoppel-asserter must have changed his position upon the faith of the misrepresentation of authority, and here he has done nothing—well,

that is to say, he has done nothing but sign something. Just so; he's done nothing, except that he has done something. Has he not come into relations with the agent? If he has not changed his position, where or how did he get a cause of action against the agent for wrongful assertion of authority? Is not his new position this: that he has a right to get the horse, or to sue for the loss of his bargain. What more could he do, had the agent had the alleged authority?—sue, in one case, the agent, and, in the other, the principal. The Professor himself upon another page (46) speaks of the estoppel-asserter having acted upon it by *coming to an agreement* with the agent.”

Well, to begin with, I suppose all executory contracts are not covered by the Statute of Frauds, and so perhaps the third party has not signed anything, but has merely spoken certain words. But let that go,—it is not of enough importance. “Is not his (the third party's) new position this: that he has a right to get the horse or to sue for the loss of his bargain?” If this means that the third party has his option to sue either principal or agent, as he pleases, I must deny its truth. If the third party has a right against the principal to get the horse, he has necessarily no rights against the agent, for he has not lost his bargain. If, on the other hand, he has a right to sue the agent, it is because he has lost his bargain and he cannot therefore have any right against the principal to get the horse. Observe now my learned brother's argument: “Has he (the third party) not come into relations with the agent? If he has not changed his position, where or how did he get his cause of action against the agent for wrongful assertion of authority?” Of course, on my theory, he has no such action, for I contend he has a contract with the principal. On the estoppel theory, however, I agree he ought to have such an action, because in a purely executory contract, immediately after it has been made, he has acquired no rights against the principal, he not having changed his legal position. Now, says Mr. Ewart, in effect: The third party has an action against the agent for wrongful assertion of authority and the loss of his bargain (this admits, then, that he has no right against the principal, for, as stated, if he had, the action would not lie against the agent); he could not get this for nothing, so he must have given something for it; he must therefore have changed his position and given up something—just what this is Mr. Ewart does not

see fit to tell us—therefore (note the conclusion), the principal is estopped, therefore the third party has a right against the principal! Shall we add: Therefore he has no right against the agent? Now this may be good logic according to Mr. Ewart's library, but it certainly is not according to mine or any other I have ever seen.

Even if we assume, for the moment, the logic of the foregoing to be good, let me point out once more that Mr. Ewart fails to tell us just what the third party's change of position is. It cannot be the gaining of the action against the agent, for

"The change of position, to effectuate estoppel, must have been prejudicial to the estoppel-asserter. If he really benefitted by the change or was in no way hurt by it, he has nothing to complain of."¹

Mr. Ewart impliedly recognizes this, if I understand him aright, and so argues: He has gained the action against the agent; to gain this he must have given something; therefore he has changed his position prejudicially. Having got this far he stops. Just what the prejudicial change is, he seems unable to say. Surely he does not mean that the labor of speaking the words, or signing the memorandum (if he did so) is the change in position? If not, what is it?²

Let me suggest one more difficulty with this part of Mr. Ewart's argument. Suppose, as may happen, the agent be a married woman in a jurisdiction where her common law disabilities have not been removed. I suppose it is clear she could not be sued on an implied warranty of authority in the case under consideration; therefore the third party has gained nothing in such a case and so has lost nothing, and the principal will not be estopped. Surely the answer to the question whether the principal

¹ Ewart on Estoppel, p. 146.

² As a matter of fact, is not the action against an agent for his wrongful assertion of authority, on the basis of an implied warranty of authority, entirely anomalous? Is it not based upon a fiction, and was it not really invented (in *Collen v. Wright* (1857) 8 E. & B. 647, 27 L. J. (N. S.) Q. B. 215) so that the liability would survive against the agent's executor where the tort action for deceit would not? This is the view expressed in *Pollock on Torts* (American Edition, page 659), and has always commended itself to me as the correct one. Carried to its logical conclusion, the doctrine, to my mind, comes very near in some cases to giving the third party something for nothing.

be bound cannot depend upon the presence or absence of contractual capacity in the agent.

Space fails me to point out in detail numerous other passages in my article which Mr. Ewart has—I do not say “with malice aforethought”—misinterpreted. I must, however, at least remark that my failure to mention them more specifically here is not to be construed to mean that I assent to his interpretations, for I most emphatically do not.

Before closing let me add a few words concerning a point raised by the reviewer of my article, in the *Harvard Law Review*.¹ I quote:

“The article illustrates the danger of this unsatisfactory phrase ‘apparent authority.’ At times it is used by the courts and text-writers to mean what is better termed ‘incidental authority,’ and then again is extended to cases where the only ground of liability seems to be estoppel. As an example of the former, a person in charge of a store may be said to have ‘incidental authority’ to sell any of the goods, in spite of instructions to the contrary. However, if X is appointed my agent only to sell my black horse, but I tell Y that X is authorized to sell my white horse and then X gets my white horse without my knowledge and sells it to Y, it would seem clear that X was not my agent at all, and yet I am estopped to deny it. Some of Mr. Cook’s language is broad enough to include such a case within apparent authority. If he means that, then logically he should go the next step and say that even where X has never been appointed my agent for any purpose, but I tell Y that he is my agent and Y deals with him in that capacity, there, too, I am liable on principles of contract by manifesting my intention through an agent. The objection to that is, that it is making X my agent or mouthpiece, when perhaps I have expressly told him that he should not be. It is saying that actual agency is not necessary in law, and that legal agency is created whenever I lead third parties to believe that X is my agent whether that is in fact true or not. That would be raising another fiction in the law to swell the already numerous collection of phenomena.”

Let me say that I did and do intend to go the whole distance. I contend that there is absolutely no distinction in principle, that the decisions in the books require no distinction to be made, nor permit it to be made, between the case, on the one hand, where the agent merely violates so-called “instructions,” *i. e.*, where he exceeds his “real,” but keeps within his “apparent” authority, and that, on the other hand, where he has no “real” authority whatever,

¹ 18 *Harvard Law Review*, p. 400.

but only "apparent" authority. If my position be sound, this must of necessity be so. Concretely: By words, acts, or both together, I hold a certain person, X, out to the world as general manager of my hotel, with the usual powers of such persons—for example, in the purchasing of food supplies on my credit. I maintain it is entirely immaterial whether as between X and myself the internal relationship (of principal and agent) exists. I may have forbidden him to buy any supplies whatever without my consent in each particular case; yet, so far as the persons to whom he is thus held out be concerned, he is my agent, with that authority and no less—the external relationship exists, and that is sufficient. To apply our principle as enunciated above to the case: When X offers to buy certain food supplies for the hotel, I appear to the person to whom the offer is made to be offering, through my agent, to make a contract with him, and I am responsible for the appearance. When, therefore, the offer is accepted I am bound by a contract, not by estoppel.

In closing, let me once more repeat that I deny there is any fiction in my analysis of the situation. Jurisprudence is not psychology; the law normally deals with external, not with internal, phenomena. Agency is a question of fact; that is true enough, but we must not forget that the external relationship may exist, as a fact, even though the internal one does not. So far as the persons to whom I have held a given person out as possessing certain authority are concerned, the relationship of principal and agent does exist; he is authorized, has authority, to act for me to that extent; he is, in fact, my agent, with that authority, and I am bound, if at all, because through my agent I have entered into true contracts by making offers which have been duly accepted.

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